Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

J.A. SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

PETITION FOR A WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

Savage was a reporter for the San Francisco Bay Guardian. Both have long been outspoken critics of Pacific Gas and Electric Company. When Savage became a free-lance stringer for the Journal of Commerce, PG&E told the editor of the Journal that PG&E did not cooperate with Bay Guardian reporters, including Savage. The Court of Appeal of California ruled that Savage may sue PG&E for interference with prospective economic advantage because (1) PG&E, found to be a "state actor," violated Savage's First Amendment and Fourteenth Amendment rights, and (2) PG&E had no First Amendment right to decline cooperation. The questions presented are:

1. Is a public utility's conduct when dealing with the news media "state action"?

2. Does a public utility have a First Amendment right not to assist in the dissemination of views which are antithetical to its beliefs and interests?

RULE 29.1 LISTING

Petitioner Pacific Gas and Electric Company has the following subsidiaries and affiliates:

PG&E - Corporate

Pacific Gas and Electric Company
- Mission Trail Insurance (Cayman) Ltd.
- Pacific Energy Fuels Company

Customer Energy Services Business Unit

Pacific Conservation Services Company

Gas Supply Business Unit

Alberta and Southern Gas Co. Ltd.
- Alberta and Southern Gas Marketing Inc.

Calaska Energy Company

Eureka Energy Company

Natural Gas Corporation of California
- NGC Production Company

Pacific California Gas System, Inc.

Pacific Gas Properties Company

Pacific Gas Transmission Company
- Pacific Northwest Gas System, Inc.
- Rocky Mountain Gas Transmission Company

Standard Pacific Gas Line Incorporated

Non-Utility Business Unit

PG&E Enterprises
- ANGUS Petroleum Corporation
- NOVA Enterprises
- PG&E Generating Company
  - Aplomado Power Corporation

RULE 29.1 LISTING – Continued

Black Hawk Power Corporation
Black Hawk I Power Corporation
Black Hawk II Power Corporation
Black Hawk III Power Corporation
Brodia Enterprises
Brodia I Enterprises
Caracara Power Corporation
Cooper's Hawk Power Corporation
Cormorant Power Corporation
Eagle Power Corporation
Falcon Power Corporation
  Scrubgrass Power Corp.
Goshawk Power Corporation
Harrier Power Corporation
Heron Power Corporation
Jaeger Power Corporation
Kestrel Power Corporation
Kite Power Corporation
Larkspur Power Corporation
Merlin Power Corporation
Osprey Power Corporation
Pacific Energy Services Company
Pelican Power Corporation
Peregrine Power Corporation
Plover Power Corporation
Red Tail Power Corporation
Toyan Enterprises
White Tail Power Corporation
PG&E Operating Services Company
PG&E Properties, Inc.
BPS I, Inc.
DPR, Inc.
Gilia Enterprises
The Conaway Ranch Company
Valley Real Estate, Inc.

RULE 29.1 LISTING – Continued

PG&E Resources Holdings Company
PG&E Resources California Company
PG&E Resources Company
PG&E Resources Offshore Company
Corpus Christi Energy Company
Corpus Christi Hydrocarbons Company
Offshore Pipeline, Inc.
Raptor Holdings Company
PG&E Management Services Company
Gray Hawk Power Corporation
Cedar Bay Cogeneration, Inc.
U.S. Generating Company (General Partnership)
U.S. Operating Services Company (General Partnership)

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Pacific Gas and Electric Company respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of California.

OPINIONS BELOW

The opinion of the Court of Appeal of California is reported at 21 Cal.App.4th 434; 26 Cal.Rptr.2d 305. (App., *infra*, pp. 1a-32a.) The opinion of the trial court (App., *infra*, pp. 33a-36a), and the order of the Supreme Court of California denying discretionary review (App., *infra*, p. 37a), are unreported.

JURISDICTION

The Supreme Court of California denied discretionary review of the decision of the Court of Appeal of California on March 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

A CASE RAISING RELATED ISSUES IS PENDING

The Court recently granted certiorari in *Lebron v. National Railroad Passenger Corp. (Amtrak)*, No. 93-1525, 62 U.S.L.W. 3670 (May 23, 1994). In *Lebron*, Amtrak refused to permit an artist to display his work on an Amtrak billboard because of the work's political content. *Lebron* raises the issues of (1) whether Amtrak's conduct constitutes state action, and (2) if it does, whether the artist's First Amendment rights were violated.

The issues raised here are closely related to the *Lebron* issues. There are differences sufficient to allow the Court, if it accepts this case as a companion to *Lebron*, to explore the issues in broader context.

STATEMENT

This case presents issues of fundamental importance to First Amendment freedoms. The California court's rulings on those issues are in clear conflict with the decisions of this Court, and fundamentally inconsistent with the decisions of the Second, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits, and the state courts of Colorado, The District of Columbia, New Jersey, New York, Pennsylvania, Kentucky, and Texas.

A. THE UNDERLYING FACTS

The relevant facts are not disputed. J.A. Savage has long been an outspoken opponent of PG&E's nuclear energy production. She is a founder of the Redwood Alliance, an activist group that has staunchly and aggressively opposed PG&E's efforts to build and operate nuclear power plants.

The San Francisco Bay Guardian has, for many years, been stridently and repeatedly critical of PG&E's conduct of its business. One of its favorite themes, repeated frequently in editorials and articles, is that PG&E's energy supply and distribution system in San Francisco should be taken over (that is, municipalized) by the City. The Bay

Guardian regularly publishes articles proposing governmental action that is diametrically opposed to PG&E's business interests, and editorials that are antithetical to PG&E's strongly-held beliefs.

In December 1987 Savage, a reporter, published two articles in the Bay Guardian. Both attacked PG&E in a highly partisan manner. One, entitled "The Deregulated PG&E: If Airline Deregulation Made You A Skeptic, Wait Until You See The New PG&E," was preceded by a Bay Guardian Editor's Note:

> [M]uch has been said about the scandalous way in which city officials and PG&E have flouted the Raker Act – and rightly so. The legacy of corruption and the fact that San Francisco is in violation of federal law are themselves incentive to municipalize PG&E.

(CT 565-68.)

At about that same time, Savage became a free-lance stringer for the Journal of Commerce. The Journal was "reaching an audience of readers who were large industrial [PG&E] customers paying a lot of attention to energy prices; should we stick with PG&E, should we go to cogeneration, should we buy power from somebody else." (CT 731.)

When PG&E learned of Savage's relationship with the Journal of Commerce, a PG&E manager, Mr. Monfried, told the Journal's editor: "[A]s a matter of policy, PG&E does not cooperate with 'The Bay Guardian' or with any of its reporters. That would, of course, include Ms. Savage." (CT 556.) In a follow-up letter enclosing one of Ms. Savage's recent Bay Guardian articles, Monfried

wrote that "I don't know how we can cooperate with Ms. Savage on *any* story." (CT 555-59, 564.)

B. THE LAWSUIT

Savage sued PG&E. The claim relevant here asserted that PG&E's statements to the Journal of Commerce constituted an interference with prospective economic advantage. The trial court granted judgment in favor of PG&E summarily, holding that the statements made by PG&E were true or nonactionable opinions. (App., *infra*, pp. 33a-36a.)

1. The Appellate Decision

The Court of Appeal reversed, ruling that Savage's "right of recovery depends ultimately on whether PG&E acted unlawfully." (App., *infra*, p. 21a.) Whether PG&E acted unlawfully, the court said, turns on whether PG&E's statements to the Journal of Commerce violated any of Savage's rights under the First Amendment and the Fourteenth Amendment of the United States Constitution. (App., *infra*, pp. 25a-28a.) If they did, the court went on, PG&E's conduct violated California Public Utilities Code section 453(a) (App., *infra*, p. 38a), which prohibits utilities from "subject[ing] any corporation or person to any prejudice or disadvantage" "as to rates, charges, service, facilities, or in any other respect." (App., *infra*, p. 28a.)[1]

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[1] A majority of the states have enacted identical (or very similar) statutes prohibiting public utilities from discriminating

The court conceded that "a private corporation generally has unrestricted freedom in dealing with the press." (App., *infra*, p. 29a.) However, the Court analogized PG&E's status to that of the defendant in *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 469 (App., *infra*, p. 27a), where the issue was: "Is the California constitutional equal protection guarantee violated when a privately owned public utility, which enjoys a state-protected monopoly or quasi-monopoly, utilizes its authority arbitrarily to exclude a class of individuals from employment opportunities?"[2] The court answered affirmatively, reasoning that "the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and in the utility's day-to-day activities." (*Ibid.*) The telephone company was a "state actor" because "the state cannot avoid responsibility for a utility's systematic business practices. . . . " (*Id.* at 470.)

From this tenuous premise, ignoring that Monfried's statement to the Journal editor could not conceivably be described as a "systematic business practice," the court here took a breathtaking leap. It held (without any evidentiary basis) that PG&E has "a status similar to" the

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among their customers. (These statutes were enacted in response to railroads' discriminatory rate practices.) To PG&E's knowledge, no other state has held that its statute may regulate a utility's speech, or its interactions with news media.

[2] Savage has not alleged a violation of any right under the California Constitution. The California court's analysis was based solely on the United States Constitution.

telephone company in 1979, and therefore PG&E executives are public officials for purposes of news media relations *as a matter of law*. Relying on a handful of cases that say, in essence, that the mayor may not call a news conference and then refuse to allow a disfavored reporter to attend (see, e.g., *Borreca v. Fasi*, 369 F.Supp. 906 (D. Hawaii 1974); App., *infra*, pp. 25a-27a), the court held that PG&E cannot decline to cooperate with Savage without violating her rights under the First Amendment and the Fourteenth Amendment of the United States Constitution. (PG&E has never barred Savage from a news conference; it has merely declined to deal with her on an individual basis.)

The court further held that PG&E's policy of not cooperating with Savage (because PG&E believed she would use PG&E's cooperation to construct a story lacking in factual accuracy, balance, and objectivity, and to advocate positions contrary to PG&E's beliefs) was not conduct protected by the First Amendment, and thus could violate section 453(a).

REASONS FOR GRANTING THE WRIT

This case presents issues of fundamental importance to First Amendment freedoms. The California court's rulings on those issues are in clear conflict with the decisions of this Court, and fundamentally inconsistent with the decisions of the Second, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits, and the state courts of Colorado, The District of Columbia, New Jersey, New York, Pennsylvania, Kentucky, and Texas.

I. THE CALIFORNIA COURT'S RULING IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT

California has ruled in this case that employees of regulated public utilities which are "quasi-monopolies" (an undefined term) are public officials when they interact with the news media. They have no right, under the court's ruling here, to decline to "cooperate" with reporters who will use this coerced cooperation to attack the utility and its legitimate business interests. The court's reasoning is broad enough to encompass a wide array of regulated businesses – of which there are many in California – in addition to public utilities.

The California court's sweeping ruling is fundamentally at odds with principles established by this Court. Public utilities *are not* required – as a matter of constitutional jurisprudence – to associate themselves with, and assist in, the dissemination of messages with which they disagree. *Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986). Public utilities *are not* "state actors" merely because they may be regulated quasi-monopolies. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).[3] The Constitution does not contemplate restricting the First Amendment rights of persons – including corporations – in order to enhance the relative voice of their adversaries. *Buckley v. Valeo*, 424 U.S. 1 (1976).

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[3] In the *Gay Law Students* case, the California Supreme Court said that *Jackson* has been "strongly criticized by a number of commentators." 24 Cal.3d at 473-74, n. 9. This Court continues to adhere to its holding. *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

Savage published an article in the Bay Guardian which said, in essence, that in the era of deregulation PG&E is likely to make unwise investments, leading to losses that ratepayers will be required to subsidize. (CT 565-68.) The Bay Guardian, in its accompanying Editor's Note, endorsed this view: "[F]uture ratepayers may be forced to cover the losses from investments in manufacturers of sugar substitutes and West German pharmaceuticals. [¶] That threat is just one more reason why San Francisco residents should take a long, hard look at future energy options." (CT 565.) The option favored by the Bay Guardian is municipalization. (*Ibid.*) PG&E strongly disagrees with the views and positions asserted by Savage and the Bay Guardian.

Yet the California court has ruled that the United States Constitution forbids PG&E from declining to "cooperate" with Savage if she seeks to publish more articles launching partisan attacks against PG&E. The court is wrong, and this case is worthy of review by this Court, for three reasons.

A. THE CALIFORNIA COURT'S HOLDING THAT PG&E WAS A STATE ACTOR IS IN CLEAR CONFLICT WITH HOLDINGS OF THIS COURT

In *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. 345, a public utility customer alleged she was denied due process when her electric service was shut off. The court had previously "affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions,

and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." *Id.* at 349, quoting from *Shelley v. Kraemer*, 334 U.S. 1 (1948).[4]

In *Jackson*, "the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But *the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.* The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met." *Id.* at 350-51 (footnote and citations omitted, emphasis supplied).

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[4] In a somewhat cryptic paragraph, the California court seemed to suggest that a violation of constitutional rights *without* state action would be sufficient to find a violation of Public Utilities Code section 453(a). (App., *infra*, pp. 24a-25a.) This is flatly at odds with this Court's jurisprudence. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-74 (1972).

Not only was there no evidence that the State was involved in any way in PG&E's decision not to cooperate with Savage, no one has ever suggested such an involvement or "nexus." On this record, the required nexus is completely absent.

The holding that PG&E had been granted a monopoly or quasi-monopoly by the State is irrelevant legally and wrong factually. Even assuming the utility had been granted a monopoly by the State, "this fact is not determinative in considering whether [the utility's] termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment." *Id.* at 351-52. Nor was the utility performing a "public function" because it was providing "an essential public service required to be supplied" by state law; the utility was not exercising a "power delegated to it by the State which is traditionally associated with sovereignty." *Id.* at 352-53.

Nor was the utility engaging in "state action" because it was engaged in a business that "affects the public interest": "We do not believe that such a status converts their every action, absent more, into that of the State." *Id.* at 353-54.

The purpose of the "nexus" test is "to assure that constitutional standards are invoked only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The state will be held "responsible for a private decision only when [the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Ibid.* Thus, in *Rendell-*

Baker v. Kohn, 457 U.S. 830 (1982) a state-supported school's decision to discharge teachers was not state action:

> Here, the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters.

Id. at 841.

Whether a private corporation has engaged in "state action" is "necessarily [a] fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). In this case the California court failed to conduct the inquiry.

There is *no* evidence that the State was remotely involved in PG&E's decision not to cooperate with Bay Guardian reporters, including Savage. There is no evidence that the State has shown any interest in utilities' relationships with the news media. There is not a hint of State coercion behind PG&E's decision. The State provided no encouragement – significant or otherwise, overt or covert.

Even the fundamental premise underlying the California court's ruling – that PG&E is a monopoly or quasi-monopoly – is not supported in the record. There was no evidence which suggests that PG&E's "status" is now similar to that of the telephone company in 1979; indeed, both the telephone and the energy industries have become substantially more competitive since the *Gay Law*

Students case was decided.[5] *Savage herself*, in a December 1987 Bay Guardian article, said: "In 1986, the California Public Utilities Commission began to deregulate the state's energy utilities under pressure from the Federal Energy Regulatory Commission . . . . PG&E today must compete in an unregulated market with customers who can buy their own gas supplies from one or a number of producers." (CT 565-66.)

By no stretch of the imagination may PG&E's decision not to cooperate with Savage be "fairly attributable" to the State of California. *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988). There is *no* "nexus" between the State and PG&E's decision. The State cannot be found responsible for PG&E's decision under any test ever endorsed by this Court. The California court's finding of state action here was simply and fundamentally wrong.

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the

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[5] The California Public Utilities Commission has been moving away from tight regulation of public utilities. The telephone industry is now regulated in an entirely different manner than it was in 1979 when *Gay Law Students* was decided, and the same is increasingly true for PG&E. The CPUC has recently issued a proposed policy statement that would, if adopted, revolutionize the electric service industry in California and completely alter the landscape of competition, leaving PG&E but one of a number of highly competitive suppliers. CPUC Order Instituting Rulemaking and Order Instituting Investigations, No. R.94-04-031/I.94-04-032 (April 20, 1994). It is ironic that as the CPUC moves away from close regulation of utilities because of the forces of competition, the California court has reached into history in order to find a basis for quasi-public action.

reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Lugar*, 457 U.S. at 936-37.

The California court failed to adhere to the "state action" requirement. It improperly infringed PG&E's individual freedom, and without any foundation in fact blamed the State for conduct of which it was wholly unaware, and over which it exercised absolutely no influence or control. The California court's ruling is in clear conflict with this Court's decisions.

B. THE CALIFORNIA COURT'S FINDING OF STATE ACTION AS A MATTER OF LAW IS IN CLEAR CONFLICT WITH THE FACT-BOUND STANDARD EMPLOYED BY THE UNITED STATES CIRCUIT COURTS OF APPEALS AND SEVERAL STATES

The California court's finding of state action was based *solely* on (1) PG&E's status as a regulated industry, and (2) the court's assumption that PG&E is a "quasi-monopoly" similar in status to the telephone company as it existed in 1979, when it dominated that industry in California. That is, the court found state action – without *any* factual inquiry or *any* supporting evidence in the record – *as a matter of law*.

This finding conflicts not only with the teachings of this Court (*Lugar*, 457 U.S. at 939; *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)), it conflicts with the holdings of lower courts who have treated the question as one of fact and who have conducted the necessary fact-sifting.

See, in the United States Circuit Court of Appeals, *Mathis v. Pacific Gas and Elec. Co.*, 891 F.2d 1429, 1431 (9th Cir. 1989):

> [Plaintiffs'] claim of state action is essentially confined to allegations that PG&E is a public utility subject to extensive regulation. That fact, without more, is insufficient to infuse its conduct with state action.

See also United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, 3 F.3d 634, 639 (2d Cir. 1994) (whether a person's conduct constitutes state action must be determined on a case-by-case basis by sifting facts and weighing circumstances). *Accord*: *Behagen v. Amateur Basketball Ass'n of the U.S.*, 884 F.2d 524, 530 (10th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990); *Dunwoody Homeowners Ass'n, Inc. v. DeKalb County, Ga.*, 887 F.2d 1455, 1462 (11th Cir. 1990); *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1284 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2797 (1991); *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 218 (4th Cir. 1994); *McKeesport Hospital v. The Accreditation Council for Graduate Medical Education*, ___ F.3d ___, 1994 WL 187838 (3rd Cir. 1994).

Many states have also adhered to the principle that "[o]nly by sifting facts and weighing the peculiar circumstances" can the presence or absence of state action be determined. *Radiological Society of New Jersey v. Sheeran*, 418 A.2d 1300, 1309 (N.J. 1980). *Accord*: *Professional Ins. Agents Ass'n of Pa., Md., and De., Inc. v. Chronister*, 625 A.2d 1314, 1317-18 (Pa. 1993); *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, 862 S.W.2d 297, 299 (Ky. 1993), *cert. denied*, ___ S.Ct. ___, 62 U.S.L.W. 3522 (1994); *Weaver v. AIDS Services of Austin, Inc.*, 835 S.W.2d 798, 801 (Tx. 1992); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 60-61 (Colo. 1991); *Woodward and Lothrop v. Hillary*, 598 A.2d 1142, 1144 (D.C. 1991); *People v. Kern*, 555 N.Y.S.2d 647, 655 (N.Y. 1990), *cert. denied*, 498 U.S. 824 (1990).

There is thus a conflict between California's version of the state action requirement and that adopted by a number of federal circuits and state courts. California holds that regulated businesses are state actors as a matter of law; other courts require a factual inquiry. The lower courts are greatly in need of the Court's guidance in this area.

C. THE CALIFORNIA COURT'S HOLDING THAT PG&E HAS NO FIRST AMENDMENT RIGHT TO DECLINE TO ASSIST IN THE DISSEMINATION OF A MESSAGE WITH WHICH IT DISAGREES IS IN CLEAR CONFLICT WITH DECISIONS OF THIS COURT

The California court ruled that PG&E's decision not to assist Savage in her crusade against PG&E did not raise a legitimate First Amendment issue as to PG&E's

expressive rights. Again, the court was wrong on a fundamental issue of First Amendment rights, as well as in conflict with decisions of this Court. There is, moreover, a conflict on this issue between California and Colorado, on one hand, and the Seventh Circuit, on the other.

Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment fosters. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). This Court has made clear that PG&E enjoys the full protections of the First Amendment freedoms extended to all private persons and corporations:

> [The California Public Utilities Commission] argue[s] that [PG&E's] status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected this argument.

Pacific Gas & Elec. Co. v. Public Util. Comm'n, supra, 475 U.S. at 17, n. 14, citing *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 534, n. 1 (1980) ("We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection"); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 567-68 (1980) ("[A]ppellant's monopoly position does not alter the First Amendment protection for its commercial speech").

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . The right

to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' " *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), quoting from *Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943). *See also Lehnert v. Ferris Faculty Ass'n*, 111 S.Ct. 1950, 1957 (1991). Thus, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court found that a Florida right-of-reply statute violated the First Amendment because "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' " *Id.* at 257, quoting from *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1963). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977). The California court's ruling will unquestionably chill the speech of PG&E and other utilities. PG&E may speak less to everybody if the ruling stands.

In *Pacific Gas & Elec. Co. v. Public Util. Comm'n, supra*, 475 U.S. 1, Toward Utility Rate Normalization sought a Public Utilities Commission order forbidding PG&E from distributing political editorials in a newsletter included in PG&E billing envelopes. The PUC ruled that the "extra space" in a billing envelope, after the bill was inserted, was the property of ratepayers and must be allocated between PG&E and organizations that oppose its political views. *Id.* at 5-6. This Court reversed, holding that PG&E had a First Amendment right not to help spread a message with which it disagrees.

Noting that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set," the Court

observed that it had "previously considered [in *Tornillo*] the question whether compelling a private corporation to provide a forum for views other than its own may infringe the corporation's freedom of speech." *Pacific Gas & Elec. Co.*, 475 U.S. at 9.

> The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to [PG&E] as well as to the institutional press. Just as the State is not free to tell a newspaper in advance what it can print and what it cannot, the State is not free . . . to force [PG&E] to respond to views that others may hold. Under *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden.

Id. at 11-12 (citations and internal quotation marks omitted).

Under *Pacific Gas & Elec. Co.* PG&E has a First Amendment right not to assist Savage in the dissemination of views with which PG&E disagrees. "[F]orced associations that burden protected speech are impermissible." *Id.* at 12. PG&E has a First Amendment right to decline to provide information to persons who will use the information to disseminate a message that is diametrically opposed to PG&E's interests and convictions.[6]

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[6] *See also*: *Central Illinois Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169 (7th Cir. 1987) ("forced access" statute requiring regulated utilities to place messages prepared by Citizens Utility Board in billing envelopes "impermissibly places a burden" on the utility's speech).

Compare: *Mountain States Tel. & Tel. Co. v. District Court*, 778 P.2d 667 (Colo. 1989) (District Court's order requiring regulated

It matters not that Savage is a reporter. PG&E has "the right to be free from government restrictions that abridge its own rights in order 'to enhance the relative voice' of its opponents." *Pacific Gas & Elec. Co.*, 475 U.S. at 14, quoting from *Buckley v. Valeo, supra*, 424 U.S. at 49 and n. 55. "[T]he concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.

The few First Amendment cases relied upon by the California court are all lower court decisions and all involve reporters who were excluded or inhibited from gathering information generally available to the public and the media. For example, in *Borreca v. Fasi*, 369 F.Supp. 906 (D. Hawaii 1974) the court found unconstitutional the mayor's practice of excluding from news conferences a reporter he considered "irresponsible, inaccurate, biased, and malicious." In *Westinghouse Broadcasting Co., Inc. v. Dukakis*, 409 F.Supp. 895 (D. Mass. 1976) the court invalidated a Boston city council order excluding from council meetings a television/radio station being run by managers while employees were on strike. In each case, public information was being disseminated by public officials in a public forum. The situation here is not remotely analogous. Savage is free to come to any PG&E news conference or to receive information PG&E disseminates publicly. That is not in issue here.

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utility to provide space in its billing envelopes for notice of pending class action brought against utility by customers does not infringe utility's First Amendment rights).

Suppose that Savage asks for interviews with PG&E executives on the subject of the company's investment strategies. Under the California court's ruling, PG&E may feel compelled to grant the interviews despite that: (1) PG&E knows Savage has written stories in the past on the subject of PG&E's investment strategies that lack objectivity, are factually inaccurate, and are stridently adversarial, and (2) PG&E believes Savage will twist the information obtained in the interview to publish more such stories.

If the executives are compelled to conduct the interviews, they will be forced to respond to views that Savage and the Bay Guardian hold. They might well be penalized for the expression of particular points of view, or forced to alter their views to conform with an agenda they do not set. This is precisely the sort of infringement of PG&E's First Amendment rights that the Court has declared unconstitutional. *Pacific Gas & Elec. Co.*, 475 U.S. at 11-12.

The California court's construction of Public Utilities Code section 453(a) to prohibit PG&E from declining to assist its news media adversaries renders the statute unconstitutional as applied. The statute as construed compels PG&E to speak and literally prohibits speech which is discriminatory "in any respect." The statute therefore "does not aim specifically at evils within the allowable area of [governmental] control, but . . . sweeps within its ambit other activities that . . . constitute an exercise [of protected expressive rights]." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). The statute is unconstitutional as interpreted and applied by the California court.

How a corporation conducts its relations with news media is a business management matter. In this arena, PG&E's management acts in the same manner as any other private corporation. The California court does not, and rationally cannot, explain how PG&E's status as a utility had any effect on the management decision in issue here.

> It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership.

Missouri ex rel. S.W. Bell T. Co. v. Public Serv. Com., 262 U.S. 276, 288-89 (1923).

PG&E was not, as we have shown, a "state actor" in this matter. PG&E's right *not* to speak to adversarial reporters is equivalent to, and no less than, that of any private citizen. That is, it is afforded full constitutional protection.

Savage has no "right of access" to nonpublic information. "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the general public." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

PG&E has a First Amendment right not to provide information that is not generally and publicly available to its opponents in the news media. Savage has no First

Amendment right to obtain such information. The California court's edict requiring PG&E to "cooperate" with Savage violates PG&E's First Amendment rights. Savage has no First Amendment right to demand PG&E's "cooperation."

The First Amendment does not require PG&E, even if it is a state actor, to "cooperate" with all reporters on equal terms. Suppose the President of the United States, the quintessential state actor, announced that he would no longer give interviews to a particular reporter or newspaper. It is inconceivable that any court would enjoin that policy from being implemented.

The California court's ruling is in clear conflict with First Amendment principles established by this court. The importance of these principles warrants review here.

II. THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE TO FIRST AMENDMENT FREEDOMS

The California court's holding – that officials of privately-owned public utilities are "public officials" in their news media relations – presents an issue of fundamental importance to First Amendment rights. The states have reached inconsistent results on the "state action" question. The law badly needs the consistency that only this Court can provide.

That the court's ruling alters the character, and permissible conduct, of every employee of every regulated utility in California, on erroneously-stated constitutional

grounds, is alone sufficient to make the questions presented of sufficient importance to warrant consideration by the Court.

Moreover, this is not just a public utilities issue. The state closely regulates many businesses. The Court of Appeal's finding that close regulation may be sufficient – as a matter of law – to find state action may affect a wide range of businesses. As this Court has noted, states subject many and varied enterprises to the same general regulatory scheme as public utilities. *Jackson*, 419 U.S. at 351, n. 7 (sewage collection and disposal companies, and freight forwarding and storage companies, among many others). Are employees of all regulated industries de facto public officials as a matter of law? If not, who is and who is not? The California court gives no guidance.

In this era of nationwide deregulation of public utilities there is increasing interest – as evidenced by the Bay Guardian articles – in how privately-owned public utilities have conducted business in the past, and how they will conduct business in the future. The California court's ruling will be used as a sword by members of the news media beyond California's borders who wish to obtain nonpublic information from utilities or other partially regulated businesses.

PG&E believes that the California court's rulings on issues arising out of the United States Constitution are irreconcilable with prior holdings of this Court and principles frequently articulated by it. The California court does not mention – much less attempt to distinguish – *Jackson, Pacific Gas & Elec. Co.*, or any of the other relevant Supreme Court authorities discussed above.

The California court has addressed important constitutional questions with substantial and widespread implications, and has decided them wrongly. PG&E respectfully urges the Court to correct the error and arrest the damage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 10, 1994

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

CERTIFIED FOR PUBLICATION
SEE CONCURRING OPINION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

J. A. SAVAGE,

Plaintiff and Appellant,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant and Respondent.

_____/

A057595

Super.Ct.No. 889060

(Filed December 27, 1993)

This is an appeal from a judgment of dismissal entered upon separate orders granting a motion for judgment on the pleadings and a motion for summary adjudication.

A journalist who formerly covered energy matters in Northern California, J.A. Savage (hereafter appellant) filed the present action against Pacific Gas and Electric Company (hereafter PG&E), three PG&E executives, David Monfried, Richard Clarke, and Dick Davin, and certain other parties on March 4, 1988. In several causes of action, she charged that the defendants interfered with the pursuit of her profession as a journalist. Following certain preliminary motions and rulings, the parties entered into a stipulation whereby appellant dismissed the complaint against the three executives and PG&E

acknowledged that the executives acted within the scope of their authority as managing agents for PG&E and consented to the filing of a second amended complaint. This amended complaint, filed October 3, 1990, alleged nine causes of action: (1) conspiracy to induce breach of contract, (2) intentional interference with economic relationships, (3) conspiracy to interfere with economic relationships, (4) tortious inducement of a breach of contract, (5) intentional infliction of emotional distress, (6) intentional interference with utility ratepayers' rights, (7) slander, (8) libel, and (9) injunctive relief.

PG&E responded by moving for judgment on the pleading with respect to the sixth, seventh, and eighth causes of action. In an order dated January 8, 1992, the court denied the motion as to the seventh cause of action for slander but granted it without leave to amend as to the sixth cause of action for intentional interference with utility rate payers' rights and with ten days leave to amend as to the eighth cause of action for libel. Appellant did not choose to amend this cause of action.

PG&E next moved for a summary adjudication of the remaining causes of action, requesting a ruling that each cause of action "has no merit." The court granted the motion in an order dated March 6, 1992, and directed that judgment be entered "in accordance with the matters so adjudicated." Appellant moved for reconsideration. On April 17, 1992, the court denied the motion for reconsideration and entered judgment for the defendant.

In this appeal, appellant focuses her attack on the orders pertaining to the two causes of action for defamation and the cause of action for interference with ratepayers' rights. With respect to the latter, the California Public Utilities Commission appears as amicus curiae on appellant's behalf. We also choose to consider the causes of action for interference with contract and economic relations because they are very closely related to the defamation causes of action, but we regard any assignment of error with regard to the first, third, fifth and ninth causes of action as waived.

Since the order granting summary adjudication had the same effect as an order granting summary judgment, we consider it under the well established principles governing review of summary judgments. We refrain from weighing the evidence but inquire only whether there are any triable issues of fact. (*Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 589; *Friedberg v. Friedberg* (1970) 9 Cal.App.3d 754, 763.) " 'The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory.' [Citation.] 'The affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion.' " (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35-36.)

From 1979 through 1984, appellant resided in Humboldt County where she was a PG&E ratepayer. During this time, she helped found a loosely organized group known as the Redwood Alliance, dedicated to opposing PG&E's plans for nuclear power. In the late 1970s, she

appeared on local television as a representative of the group to explain its views on the decommissioning of the PG&E Humboldt Bay nuclear power plant. In 1981 and 1982, she represented the Redwood Alliance in a Public Utility Commission (PUC) proceeding, designated OII-86, which concerned among other things the financing of nuclear facility decommissioning costs. She appeared in a series of hearings on behalf of the Redwood Alliance and participated in the cross-examination of expert witnesses." In 1983, she was one of the authors of prepared testimony that the Redwood Alliance submitted to the PUC in a rate case involving the Humboldt Bay nuclear power plant.

According to appellant, she did not attend meetings of the Redwood Alliance or participate in any of its activities in 1985, and she moved to the San Francisco Bay area sometime during that year. Early in 1986, the Redwood Alliance participated in another PUC proceeding involving the Diablo Canyon nuclear power plant. It needed to appear in two pretrial hearings in San Francisco to secure the status of an intervenor but was reluctant to incur the cost of sending an attorney or other representative for this limited purpose. Appellant agreed to accommodate the group by appearing on its behalf at two pretrial hearings on January 13, 1986, and July 23, 1986. She states that she spent a total of 5.25 hours at the two hearings, acting as a volunteer without any expectation of payment or reimbursement for expenses. The record of the hearings discloses that her participation was limited to announcing the intention of the Redwood Alliance to intervene.

Appellant avers that from July 23, 1986, to the present, she has not participated in any further public utilities cases or attended any meetings of the Redwood Alliance. PG&E objects that these assertions are contradicted by a judicial admission: the original complaint alleged that appellant "was at all times relevant hereto, a . . . member of the Redwood Alliance." Appellant urges that we disregard this allegation as "a misstatement in the pleadings drafted by [her] attorneys." We recognize that a plaintiff is generally "bound by well pleaded material allegations. . . . " (4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 406, p. 455) "Where a complaint contains allegations destructive of a cause of action the defect cannot be cured by their omission without explanation in a subsequent pleading." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1058.) But the record indicates that the disputed allegation was in fact virtually meaningless; the Redwood Alliance did not require payment of dues, issue membership cards, or maintain any formal accounting of membership. The "members" were only those people who rallied to its activities at a particular time. In light of this evidence, the allegation clearly could be such an inadvertent error as appellant should be allowed to correct. (4 Witkin, Cal. Procedure, *supra*, Pleading, § 411, p. 458.)

On December 29, 1986, appellant was hired by a trade publication, Energy User News, as its West Coast correspondent. Though a small publication with a circulation of only about 12,000-15,000, the magazine had gained a respected niche in the industry. A PG&E executive described it as being "preeminent in its field." Appellant's immediate supervisor, Cornelia Clay-Fulghum, stated that the editorial staff was informed "since the

beginning" that appellant had anti-nuclear views. Nevertheless, she reported for the publication throughout the next 11 months without incurring any criticism for bias.

In mid-November 1987, PG&E's chief executive officer, Richard Clarke, accompanied by four other top executives, visited the editorial offices of Energy User News in New York during an annual trip to meet "with the financial community and with key reporters and editors." The executives included David Monfried, the manager of the news services department, who was responsible for media relations. It was the first time that PG&E executives had visited the magazine during their annual trip to New York and the entire editorial staff turned out for the occasion. Besides being an important sources of news, PG&E also bought a modest amount of advertising in the magazine.

While leaving the interview by car, PG&E executive, David Monfried, remarked to the chief executive officer, Richard Clarke, that the West Coast correspondent of Energy User News might have a conflict of interest. Clarke told Monfried to look into the matter. As events unfolded, Monfried's suspicions drew upon two sources of information – a PUC order compensating the Redwood Alliance and a conversation between a PG&E employee and a representative of the Redwood Alliance.

Several months after appellant's appearance on July 23, 1986, the Redwood Alliance actively intervened in a protracted trial of the Diablo Valley Canyon nuclear power plant case. When the PUC issued an opinion favoring its position, the Redwood Alliance secured a further

PUC opinion ordering PG&E to pay it $78,387.98 as compensation for legal services and other expenses. The opinion contained an entry requiring payment of $262.50 to appellant as a "participant" in the proceeding, for 5.25 hours of work at a rate of $50 per hour.

On November 18, 1987, the day after the Energy User News interview, Dick Davin, a senior news services representative in David Monfried's department, attended a PUC hearing at which a representative of the Redwood Alliance, Larry Goldberg, appeared. During a break, the two men engaged in a brief, casual conversation that Davin related to Monfried in a telephone call later the same day. According to Davin, he asked Goldberg "if he had anyone locally." Goldberg replied, "[Y]es, J.A. Savage." When David expressed surprise, Goldberg added that appellant "did historial information and economic comparisons." Davin was sure that Goldberg was referring to work appellant did for the Redwood Alliance and he understood Goldberg to say that she was currently working for the group.

Goldberg directly contradicted on every material point Davin's account of their conversation. In a declaration submitted in opposition to the motion for summary adjudication, Goldberg stated, "On November 18, 1987, I attended a prehearing conference held at the California Public Utilities Commission on behalf of the Redwood Alliance. After the prehearing conference I was approached by a gentleman who identified himself as being from Pacific Gas and Electric Company's (PG&E) public relations department. When I asked for his card, he said he was new in the public relations department and thus did not have one. This gentleman asked me if I

knew J.A. SAVAGE to which I responded, "Yes." He also asked what role she had played in the Redwood Alliance's completed Diablo Canyon Decommissioning rate case which the Redwood Alliance had recently been ordered compensated in. In response, I told him that she had worked in the past with the Redwood Alliance on decomissioning issues. However, I did not tell this PG&E employee that Ms. SAVAGE was currently working for or doing research for the Redwood Alliance or that she was a member of the Redwood Alliance as these statements would have been false." Goldberg confirmed that appellant had not participated in activities of the Redwood Alliance after July 1986.

Though the sequence of events is unclear, Monfried apparently first called Cornelia Clay-Fulghum, an editor of Energy User News who was appellant's immediate supervisor. Clay-Fulghum testified that "he [Monfried] was very agitated" upon learning that appellant had been awarded compensation for her participation in the Diablo Valley Canyon case. He asked her such questions as: "don't you think that a reporter shouldn't be in this situation. . . . " And: "don't you think that she has a conflict of interest. . . . " She found the questions to be "accusatory," and she understood Monfried to be implying that appellant "lacked objectivity in reporting. . . . "

Monfried next raised the subject of appellant's conflict of interest in two conversations with the chief editor of Energy User News, Rick Mullin. Monfried testified, "I told the editor of Energy User News that in my opinion Ms. Savage may have a conflict of interest. Would they be interested in knowing of it." More specifically, he told Mullin "that it seemed to [him] that there was a conflict

of interest because Ms. Savage was a paid intervenor on behalf of the Redwood Alliance which is opposing PG&E in key rate cases." He based his opinion on the PUC order compensating her for "participation in a PUC case" and on the conversation between Davin and Goldberg. In his view, this conversation indicated that appellant had a "continuing association" with the Redwood Alliance. He "imparted" to Mullin the information he had received from Davin regarding the conversation. Mullin generally confirmed Monfried's account of their conversation, adding that Monfried said "he had in his possession documents that indicate that [appellant] was paid to participate in this PUC hearing on behalf of the Redwood Alliance. . . . "

At Monfried's request, Dick Davin wrote a letter to Mullin, dated November 18, 1987, with three enclosures – the PUC order compensating the Redwood Alliance in the Diablo Valley Canyon rate case, a transcript of the pretrial hearing in this case on January 13, 1986, and a cover page on a PG&E brief dated November 7, 1986, which listed appellant as a contact person for the Redwood Alliance in the case. In addition to noting these enclosures, the letter recounted Davin's conversation with Larry Goldberg earlier that day. Davin wrote: "Coincidentally, today I attended a pre-hearing conference on Diablo Canyon's Operation and Maintenance costs, which will be the subject of hearings in March of next year. A Mr. Larry Goldberg, on behalf of the Redwood Alliance, requested intervenor status. As he is from Eureka, I asked him if he had anyone locally. He said yes, J.A. Savage. He said that she does research for the Alliance, particularly on historical information and economic comparisons."

A few days later, on November 24, 1987, Mullin fired appellant as the newspaper's West Coast correspondent on the ground that she had a conflict of interest. He says that he reached this conclusion "after speaking to her, and bringing to her what seemed to be facts. . . . " Though denying that he was influenced by PG&E, Mullin acknowledged that prior to his discussions with Monfried he wasn't "considering firing her or discharging her. . . . " He formally communicated his decision to appellant in the following memo: "It has come to my attention that you have been involved with and worked for – indeed you are one of the founders of – a group called the Redwood Alliance, which has intervened in a case against Pacific Gas & Electric. I feel your association with this group, current and/or historical, constitutes a conflict of interest that irreparably compromises your objectivity as a reporter for Energy User News. Given your refusal to resign in light of this matter, I feel I must terminate your employment, effective immediately."

Soon after her discharge, appellant entered into a relationship with the Journal of Commerce whereby she would report as a free-lance stringer, paid on an article-by-article basis. The record reveals that Monfried again intervened with her editor through a telephone call and letter suggesting her bias. Again, she lost her position with the publication. Because this episode is relevant only to the cause of action for intentional interference with prospective economic advantage, we will examine it more closely in connection with our discussion of this cause of action.

We consider first the causes of action for slander and libel. At the outset, we wish to make clear our opinion

that PG&E incurred no liability by conveying true copies of government documents to the editor of Energy User News, such as, copies of the PUC order compensating the Redwood Alliance in the Diablo Valley Canyon case and the transcript of the January 13, 1986, hearing. " 'An essential element of defamation is that the publication in question must contain a false statement of *fact.*' " (*Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309.) No false representation appears here.

Similarly, PG&E cannot be held liable for Monfried's expression of opinion that appellant had a conflict of interest. In defining libel and slander, Civil Code sections 45 and 46 both refer to a "false . . . publication. . . . " This statutory definition can be meaningfully applied only to statements that are capable of being proved as false or true. (*Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397, fn. 4.) We conclude that, as a matter of law, Monfried's expression of opinion does not fall within this category of statement. The determination of a conflict of interest involves instead an application of an ethical standard to facts, reflecting the exercise of judgment. The judgment may, of course, be reasonable or unreasonable; but whatever quality may be attributed to it, the expressed belief in the existence of a conflict of interest does not imply an objective fact that can be proved to be true or false.

Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. "While such speech is not totally unprotected by the First Amendment [citation], its protections are less stringent" [than that applying to speech

on matters of public concern]. (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760; *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1694.) We note, however, that our interpretation of Civil Code sections 45 and 46 will avoid constitutional issues where matters of public concern are involved. (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19-21; *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1607-1609; *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1000-1001; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724-725. Accordingly, this construction of the statutes is favored by the principle that the court may reasonably impute to the Legislature a meaning that best avoids conflict with constitutional limitations. (*Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686, 697.)

There remains the issue of PG&E's communication of Davin's account of his conversation with the Redwood Alliance representative, Larry Goldberg. The issue turns on the accuracy of Davin's account, not the accuracy of Goldberg's information. In conveying the conversation to Mullin, the PG&E executives represented only that a knowledgable member of the Redwood Alliance had made the statements Davin attributed to him; it did not vouch for the accuracy of the information or claim independent knowledge. For PG&E to establish the defense of truth, it need only prove that Goldberg said what Davin claimed he said.

We consider that the record presents a triable issue of fact as to the truth of Davin's account of his conversation with Goldberg. We recognize that PG&E need only show

that Davin's account was substantially accurate, "irrespective of slight inaccuracy in the details. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 495, p. 584; *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. ___, 115 L.Ed.2d 447, 111 S.Ct 2419.) But the two men offered widely conflicting testimony regarding the conversation; and on review of a summary judgment, "the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Stationers Corp. v Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 373.) Construing Goldberg's declaration liberally, the record would support the inference that Davin gave a false account of his conversation with Goldberg. This false account was then conveyed to Mullin through Monfried's telephone calls and Davin's own letter.

The question thus becomes whether PG&E can be liable for defamation by communicating to appellant's editor a false account of the Davin-Goldberg conversation. We hold that it may. Civil Code section 45 defines libel as a false written publication "which has a tendency to injure [a person] in his occupation." Similarly, Civil Code section 46 defines slander as a false oral communication which "[t]ends directly to injure [a person] in respect to his office, profession, trade or business. . . . " There can be no doubt that a statement charging a journalist with conduct which is generally regarded as unethical under accepted journalistic standards would have a tendency to cause professional injury. (Cf. *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 285;

Albertini v. Schaefer (1979) 97 Cal.App.3d 822, 829; *Hanley v. Lund* (1963) 218 Cal.App.2d 633, 644, overruled on other grounds in *Adams v. Murakami* (1991) 54 Cal.3d 105, 115.)

Appellant points to evidence in the record indicating that the dual rule attributed to appellant – working for an association intervening against PG&E in a PUC proceeding while reporting on PG&E policies – would be regarded by other journalists as a serious breach of journalistic ethics. Davin testified that "anybody" would regard it as unethical. He explained, "A reporter can call PG&E and get all kinds of information. An intervenor calling me would be referred to our lawyers. . . . " Monfried observed, "I believe it's perfectly acceptable for a reporter to have political or other leanings one way or another. . . . I think it is a very different matter than a reporter being paid to represent an advocacy on one side while representing herself to her readers as objective." Edwin R. Bayley, former dean of the Graduate School of Journalism at the University of California at Berkeley, stated: "[I]t is also my opinion that a false accusation that a reporter was a paid participant in a legal action involving a utility at the same time she was employed as a reporter whose assignment was to cover that utility would be very damaging to that journalist's career. . . . " Appellant's editor, Cornelia Clay-Fulghum, concurred that it was a "pretty serious" accusation.

It is immaterial that the statements attributed to Goldberg may not be defamatory on their face. The defamatory character of language is measured "according to the sense and meaning . . . which such language may fairly be presumed to have conveyed to those to whom it

was published." (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546-547; *Slaughter v. Friedman* (1982) 32 Cal.3d 149, 154; *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 386.) In the words of Restatement Second of Torts, section 563, "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."

Thus, the courts have traditionally recognized that statements may be libelous "if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons. . . . " (*Barnes-Hind, Inc. v. Superior Court, supra,* 181 Cal.App.3d 377, 387.) "For example, a newspaper might erroneously report that 'Mrs. A gave birth to a child last night.' Mrs. A has been married only a month. The language used will take on a defamatory meaning only to those who know when Mrs. A was married. . . . " (*MacLeod v. Tribune Publishing Co., supra,* 52 Cal.2d at p. 550.) In this respect, we see no distinction today between the law of libel and slander. In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages. (Civ. Code, §§ 45a and 46; 5 Witkin, Summary of Cal. Law, *supra,* Torts, § 493, p. 580; BAJI No. 7.09 (1991 Rev.).)

The trier of fact here might reasonably find that the parties attached a defamatory meaning to the statement attributed to Goldberg. The statement was conveyed from one journalist to another, and both evidently understood

the ethical implications of a conflict of interest. In view of facts known to them, the statement implicated appellant in unethical conduct. Hence, we conclude that the record presents a triable issue of fact as to whether PG&E is liable to appellant for slander and libel by communicating a false and defamatory account of the Davin-Goldberg conversation through Monfried's telephone calls and Davin's own letter to Mullin.

We note that, following *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347, the plaintiff must also prove that the defendant was at fault in making a defamatory statement "injurious to a private individual." (Fn. deleted.) Thus appellant must prove that the PG&E executive intended to defame her or that they were at least negligent in failing to ascertain the falsity of the statement or the existence of extrinsic circumstances making the statement defamatory. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747; Rest.2d Torts, § 580B.) This additional requirement, however, does not enter into the present appeal. In seeking summary adjudication, PG&E never claimed to be free of fault in making a defamatory statement but rather relied on the theory that the statements were true or nonactionable.

Though requiring a different analysis, the question of PG&E's liability under the cause of action for interference with contractual relations ultimately rests on the same disputed issues of fact as presented by the theory of defamation. The closely related tort of interference with prospective economic advantage, however, presents a new and significant issue to the extent that it extends to the alleged interference with appellant's status as a free lance stringer for the Journal of Commerce.

As stated by our high court, the elements of a cause of action for intentional interference with contractual relations are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) The elements of a cause of action for intentional interference with prospective economic advantage differ only to the extent that it presupposes " 'an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff. . . . ' " (*Id.* at p. 1126, fn. 2.) Further distinctions may be found in the area of affirmative defenses: "a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Id.* at p. 1126.)

The tort of interference with contractual relations may be based upon appellant's employment relationship with Energy User News even if it is regarded as a contract at will – a matter on which we express no opinion. "Reviewing courts have reiterated in case after case that the contractual relationship is at the will of the parties, not at the will of outsiders." (*Pacific Gas & Electric Co. v. Bear Stearns & Co., supra,* 50 Cal.3d at 1127; *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 39.) Appellant did not have a contractual relationship with the Journal of Commerce, and it was not obliged to compensate her or to accept her articles. The newspaper merely placed her on a list of reporters privileged to submit

articles that would be reviewed for publication. Nevertheless, she did enjoy "an economic relationship" with the newspaper offering "the probability of future economic benefit" because she could expect to be paid for those articles accepted for publication.

As noted above, both torts require intentional acts designed to interfere with a contractual or economic relationship. (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 765-766.) "Intent, of course, may be established by inference as well as by direct proof." (*Id.* at p. 767.) Thus, the jury may "(illegible) culpable intent from conduct 'substantially certain' to interfere with the contract [or prospective economic relationship]." (*Ibid.*)

Decisions in this field frequently state that a cause of action under either tort theory "will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification." (*Herron v. State Farm Mutual Ins. Co.* (1961) 56 Cal.2d 202, 205; *Walsh v. Glendale Fed. Sav. & Loan Assn.* (1969) 1 Cal.App.3d 578, 588, overruled on other grounds in *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1975) 9 Cal.3d 731, 737; *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 18.) These considerations, however, do not appear in the definition of the tort but rather are relevant to the issue of "justification" which must be pleaded as an affirmative defense. (*Herron v. State Farm Mutual Ins. Co., supra,* 56 Cal.2d 202, 207; *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020; *A.F. Arnold & Co. v. Pacific Professional Ins., Inc.* (1972) 27 Cal.App.3d 710, 715; compare: Rest.2d Torts, § 766.) If the

means are unlawful, the interference cannot be justified and is beyond the reach of this affirmative defense. Unlawful means include defamation and other forms of tortious conduct. (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 35; *A.F. Arnold & Co. v. Pacific Professional Ins., Inc., supra,* 27 Cal.App.3d 710, 716; *Blender v. Superior Court* (1942) 55 Cal.App.2d 24.)

In this connection, the courts recognize a rule directly analogous to the defense of truth in causes of action for defamation. A person cannot incur liability for interfering with contractual or economic relations by giving truthful information to a third party. (*Bert G. Giannelli Distributing Co. v. Beck & Co., supra,* 172 Cal.App.3d 1020, 1057, fn. 15; *Masoni v. Board of Trade of S.F.* (1953) 119 Cal.App.2d 738, 743; Rest.2d Torts, § 772; Prosser & Keeton, The Law of Torts (5th ed. 1984) § 129, p. 989.)

In applying these principles to the present case, we have no difficulty in concluding that the record in general presents a triable issue of fact with regard to the elements of the torts of interference with contractual relations and interference with prospective economic advantage, including the element of intentional conduct. The trier of fact could reasonably find that the PG&E executive's conduct was substantially certain to interfere with appellant's interests, and infer culpable intent from this fact. The more difficult issues concern the defense of justification. Our analysis of these issues leads to the same conclusions we have reached in our discussion of defamation: PG&E cannot be liable for conveying to the editor of Energy User News truthful copies of government documents or an accurate account of Davin's conversation with Goldberg, but it may be held liable upon a

finding that Monfried and Davin defamed appellant by conveying a false account of the Davin-Goldberg conversation.

The significance of an expression of opinion presents a novel issue in this context. In view of his influential position, Monfried may well have caused appellant to lose her job by expressing to her editor an unfounded opinion to the effect that she was engaged in unethical conduct. Still, we see a social value in allowing business contacts of enterprises dealing with the public to comment freely on matters affecting their own or the public interest. (*See Imperial Ice Co. v. Rossier, supra,* 18 Cal.2d 33, 35; *Willis v. Santa Ana etc. Hospital Assn.* (1962) 58 Cal.2d 806, 810, overruled on other grounds in *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 925; *Freed v. Manchester Service. Inc.* (1958) 165 Cal.App.2d 186, 190.) Thus, in *Allen v. Safeway Stores, Inc.* (Wyo. 1985) 699 P.2d 277, the court held that a state official was justified in notifying the management of Safeway Stores that a particular store manager was mistreating participants in a food supplement program. It might be thought that an expression of opinion may sometimes be so absurd or trivial as not to serve any social interest. But we cannot find that Monfried's expression of opinion was unjustified on this rationale without evaluating the reasonableness of the opinion. Such a critique of his opinion, touching closely on First Amendment interests, would be not only futile but unwarranted by existing case law. (Cf. *Hofmann Co. v. E.I. Du Pont de Nemours & Co., supra,* 202 Cal.App.3d 390, 397.)

We turn now to the issue that pertains only to the cause of action for interference with prospective economic advantage: the alleged interference with appellant's position as a freelance stringer for the Journal of Commerce. As in many other cases in this field (e.g., *Speegle v. Board of Fire Underwriters, supra,* 29 Cal.2d 34), appellant's right of recovery depends ultimately on whether PG&E acted unlawfully. (The practical importance of this consideration prompted the authors of the Restatement of Torts to include improper conduct in the definition of the tort. (Compare: *Blank v. Kirwan* (1985) 39 Cal.3d 311, 330, and Restat.2d Torts, § 766B.) The record clearly presents a triable issue of fact as to each of the elements of the tort; the principal area of dispute concerns the justification for PG&E's action. Such justification can be precluded if PG&E acted unlawfully.

Shortly after appellant began working for the newspaper, PG&E executive, David Monfried, informed her editor, John Maggs, that he could not cooperate with appellant for the express reason that she had written two articles for a newspaper critical of PG&E, the San Francisco Bay Guardian. Monfried testified, "I informed Mr. Maggs that as a matter of policy, PG&E does not cooperate with 'The Bay Guardian' or with any of its reporters. That would, of course, include Ms. Savage." Monfried sent copies of the articles to Monfried. A cover letter transmitting one of the articles complained, "Frankly, John, I don't know how we can cooperate with Ms. Savage on *any* story – note, for instance, that she uses, in this story and in the previous one I sent you, information obtained while reporting for *Energy User News*. She

would undoubtedly do the same with information obtained while writing for the *Journal of Commerce.*"

Appellant contends that PG&E's act of excluding her from the ranks of journalists with whom it would cooperate violated Public Utilities Commission section 453, subdivision (a) (hereafter PUC). The statute provides: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

As authoritatively construed in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, section 453, subdivision (a), draws "upon the well-established common law doctrine that a monopoly is not free to exercise its power arbitrarily. . . . " (*Id.* at p. 476.) The court observed, "Since medieval times, the common law has imposed various obligations upon enterprises that exercise monopoly power to assure that such power is not exerted in an arbitrary or discriminatory manner. . . . [T]his . . . doctrine evolved into a broad common law principle which placed numerous obligations, including an obligation to avoid discriminatory conduct, upon enterprises said to be 'affected with a public interest.' [Citations.] [¶] Although the outer boundaries of the 'public service enterprise' category have not been precisely delineated, in contemporary times a public utility, such as PT&T, undoubtedly constitutes a paradigm example of an enterprise 'affected with the public interest.' " (*Ibid.*)

The issue before the court in the *Gay Law Students* decision was whether PUC § 453. subdivision (a), prohibited the PT&T from engaging in arbitrary discrimination against homosexuals in the hiring, promotion or termination of employees. Holding that it did prohibit this discrimination, the court rejected an argument that the statute proscribed discrimination only in the area of "rates, services or other consumer-related functions. . . . " (*Id.* at p. 477.) First, the court noted that such a narrow construction is "difficult to reconcile with the explicit broad language of the provision. As we have seen, the statute provides that '[n]o public utility shall, as to rates, charges, service, facilities *or in any other respect* . . . subject any . . . person to any prejudice or disadvantage.' " (*Id.* at p. 478.) The statute must be construed "to give full effect to the broad, emphasized language of the provision." (*Ibid.*)

Second, the court observed that the legislative history "evidenced a clear intent to preclude *all* discriminatory practices by regulated utilities. . . . [¶] After initially enacting legislation that proscribed rate or service discrimination, the Legislature consciously broadened the statutory prohibition to bar utility discrimination 'in any respect whatsoever. . . . ' " (*Id.* at p. 479-480.)

Third, the court relied on *James v. Marinship Corp.* (1944) 25 Cal.2d 721 which applied the common law doctrine restricting monopoly power to discrimination in employment as well as in rates and service. Although the issue of employment discrimination is not before us in this appeal, the court stressed certain language in the *Marinship* decision which has some relevance here: " ' "The question in the instant case is not one of prices or of serving the public but

one of employment. . . . However, the principle is the same; the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty." ' " (*Gay Law Students Assn. v. Pacific Tel & Tel. Co., supra,* 24 Cal.3d at p. 482, emphasis omitted.)

Finally, the court stated that the statute could reasonably be construed as prohibiting forms of discrimination recognized as unconstitutional. In an earlier portion of the decision, the court had held that California Constitution article I, section 7, subdivision (a), prohibited a public utility from engaging in employment discrimination against homosexuals. This holding, the court reasoned, favored an interpretation of PUC section 453, subdivision (a), as also prohibiting such discrimination: "the constitutional analysis set forth [above], supports a construction of section 453, subdivision (a) that prohibits arbitrary employment discrimination by a state-protected public utility. . . . [T]he language of section 453, subdivision (a) is broad and unrestricted and the legislative history suggests that the Legislature intended to impose general restrictions on discrimination by public utilities. Under these circumstances, we believe that the constitutional considerations discussed [above] constitute a strong basis for interpreting the existing statute as barring such discrimination." (*Gay Law Students Assn. v. Pacific Tel & Tel. Co., supra,* 24 Cal.3d at p. 485.)

In effect, the court states that PUC section 453, subdivision (a), can reasonably be construed as making certain general constitutional restrictions directly applicable to public utilities without a finding of the state action required to base a remedy of the constitution itself. Thus,

constitutional restrictions applying to the state or other government entities become relevant to interpretation of the statute.

"Discriminatory governmental action aimed at the communicative impact of expression is presumptively at odds with the First Amendment." (*Times-Picayune Publishing Corp. v. Lee* (U.S.D.C., E.D. La. 1988) 15 Med.L.Rptr. 1713, 1719; *Sherrill v. Knight* (1977) 569 F.2d 124, 129.) "While public officials need not furnish information, other than public records, to any news agency, a public official may not constitutionally deny to one media access that is enjoyed by other media, because one media is entitled to the same right of access as any other." (*Southwestern Newspapers Corp. v. Curtis* (1979 Tex.App.) 584 S.W.2d 362, 364-365; *American Broadcasting Companies, Inc. v. Cuomo* (1977) 570 F.2d 1080, 1083; *Westinghouse Broadcasting Co., Inc. v. Dukakis* (U.S.D.C.Mass. 1976) 409 F.Supp. 895.)

"The danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the First Amendment." (*Anderson v. Cryovac, Inc.* (1st Cir. 1986) 805 F.2d 1, 9.) Public officials of Course have a right to criticize the press. "But when criticism transforms into an attempt to use the powers of governmental office to intimidate or to discipline the press or one of its members because of what appears in print, a compelling governmental interest that cannot be served by less restrictive means must be shown for such use to meet Constitutional standards." (*Borreca v. Fasi* (U.S.D.C. Hawaii 1974) 369 F.Supp. 906,

910; *Stevens v. New York Racing Ass'n., Inc.* (E.D.N.Y. 1987) 665 F.Supp. 164, 175; *North Mississippi Commmunications [sic], Inc., v. Jones* (5th Cir. 1986) 792 F.2d 1330, 1337.)

Thus, the courts have found violations of the First Amendment where a mayor excluded reporters for a particular newspaper from major press conferences to which the press generally was invited (*Borreca v. Fasi, supra,* 369 F.Supp. 906), where a district attorney required reporters for a disfavored newspaper to obtain advance appointments not required of other reporters (*Southwestern Newspapers Corp. v. Curtis, supra,* 584 S.W.2d 362), where a race track reporter was forbidden to carry a camera into paddock areas otherwise open to the press (*Stevens v. New York Racing Ass'n., Inc., supra,* 665 F.Supp. 164), and where a sheriff directed his staff not to respond to questions of reporters from the plaintiff newspaper unless they were submitted in writing. (*Times-Picayune Publishing Corp. v. Lee, supra,* 15 Med. L. Rptr. 1713.

The frequently cited decision, *Quad-City Community News Service, Inc. v. Jebens* (U.S.D.C. S.D. Iowa, 1971) 334 F.Supp. 8 analyzed discriminatory treatment of the press under both the First Amendment and the equal protection clause. City officials had denied reporters for an underground newspaper access to police files generally available to other reporters. After finding that the action violated the First Amendment, the court addressed the equal protection issue: "No showing merely of a rational relationship to some colorable state interest suffices to justify a classification between media permitted access to the reports and others which are not so permitted. Any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be

necessary to promote a compelling governmental interest is unconstitutional." (*Id.* at p. 15.)

Having a status similar to the defendant in the *Gay Law Students* case, PG&E enjoys "a state-protected monopoly" throughout much of Northern California which "derives directly from its exclusive franchise provided by the state." (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co., supra,* 24 Cal.3d at 471.) Its monopoly over gas and electrical service in this area "is guaranteed and safeguarded by the state Public Utilities Commission, which possesses the power to refuse to issue certificates of public convenience and necessity to permit potential competition to enter these areas. . . . " (*Ibid.*) Because its monopolistic position extends over a large and economically vital geographical area, PG&E wields considerable power over the press covering its activities. Without access to PG&E as a news source, a journalist in this field is severely handicapped in the competitive search for news. Its power was dramatically illustrated by the present case. Appellant lost two successive jobs covering the public utilities industry on the West Coast after PG&E executive, David Monfried, informed her editors that she was *persona non grata* with corporate management.

In the case of a public utility enjoying such extensive monopolistic authority "affected with a public interest," there is an important public interest in assuring freedom of the press in reporting on matters lying within the exercise of its franchise. We recall the words of Justice Douglas in *Terminiello v. Chicago* (1949) 337 U.S. 1,4: "The vitality of civil and political institutions in our society depends on free discussion. . . . The right to speak freely

and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. [¶] Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas. . . . "

As construed in *Gay Law Students*, PUC section 453, subdivision (a), reflects a public utility's duty to exercise its franchise in the public interest by broadly prohibiting discrimination action that may "subject any . . . person to any prejudice or disadvantage." We conclude that it is consistent with this statutory purpose to construe PUC section 453, subdivision (a), as prohibiting retaliatory measures against journalists or newspapers based on the content of their reporting on matters lying within the exercise of PG&E's franchise. This conclusion is supported by our constitutional analysis. The broad statutory language of PUC section 453 may be reasonably construed as applying to the kind of discriminatory treatment of the press prohibited by the First Amendment and equal protection clause.

PG&E objects that its own First Amendment right "to express its opinion on a subject of importance to the company" is at stake. We agree that PUC section 453, subdivision (a), should not be construed so as to infringe on a public utilities own right of free expression. Unquestionably, PG&E has wide latitude to chose the forum,

manner, and extent of its disclosures to individual journalists. But the facts of the present case do not present any issue of reconciling PG&E's own First Amendment rights with the public interest in free debate. PG&E's action in effectively blacklisting appellant served no legitimate First Amendment purpose.

We recognize that a private corporation generally has unrestricted freedom in dealing with the press. But a public utility, occupying a significant monopolistic position over an essential public service, occupies an exceptional role. As stated in the *Gay Law Students* decision, "[i]n California a public utility is in many respects more akin to a governmental entity than to a purely private employer. In this state, the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and in the utility's day-to-day activities. [Citation.] Moreover the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a government entity than like a private corporation . . . . Under these circumstances, we believe that . . . a public utility may not properly claim prerogatives of 'private autonomy' that may possibly attach to a purely private business enterprise." (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co., supra,* 24 Cal.3d at pp. 469-470.)

Our conclusion that PG&E executive, David Monfried, may have acted improperly in intervening with appellant's editor at the Journal of Commerce fortifies our earlier conclusion that the trial court erred in dismissing appellant's cause of action for intentional interference with prospective economic advantage. As noted above,

the record plainly presents a triable issue of fact with respect to the elements of this cause of action.

Lastly, in her sixth cause of action, appellant claims a right of recovery under PUC sections 453, 454, and 2106 for interference with her rights as an intervenor.[1] Whether or not such a cause of action exists, we see no support for appellant's theory on the record. The evidence suggests only that the PG&E executives were unhappy with a perceived conflict of interest and the content of appellant's reporting for the San Francisco Bay Guardian. Since the trial court dismissed the cause of action on a motion for judgment on the Pleading, she claims the benefit of the rule that all material facts alleged in the pleading must be accepted as true. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 374.) The complaint in fact does allege that PG&E acted with "the intention of intimidating present and future intervenors. . . . " But the sixth cause of action is based on the same events as the other tort causes of action. Under these circumstances, we consider it appropriate to take judicial notice of "competent evidence of record in the lower court" in reviewing the motion. (*Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 Cal.App.3d 218, 225.) This evidence reveals no factual basis for her legal theory.

The judgment is reversed insofar as it dismisses the second cause of action for intentional interference with prospective economic advantage, the fourth cause of

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[1] We do not reach the constitutional issues raised by the California Public Utilities Commission as amicus curiae as they were not raised in the trial court.

action for interference with contractual relations, the seventh cause of action for slander, and the eighth cause of action for libel. In all other respects the judgment is affirmed. Costs to appellant.

CERTIFIED FOR PUBLICATION

Newsom, J.

I CONCUR:

Strankman, P.J.

Savage v. Pacific Gas & Electric Co. – A057595

Concurring opinion of Stein, J.

I express no opinion on the application of Public Utilities Code section 453, subdivision (a) to the facts of the case.

I concur in the result.

Stein, J.

J.A. SAVAGE v. PACIFIC GAS AND ELECTRIC COMPANY – A057595

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Trial Judge: Honorable Lucy Kelly McCabe

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SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

J.A. SAVAGE, Plaintiff, vs. PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, and DOES I through XXXX, Defendants. _____/	NO. 889060 ORDER GRANTING PACIFIC GAS AND ELECTRIC COMPANY'S MOTION FOR SUMMARY ADJUDICATION (Filed March 9, 1992) Hearing Date: February 7, 1992 Hearing Time: 9:30 a.m. Department: 9 (Law and Motion)

The motion of defendant Pacific Gas and Electric Company (PG&E) for summary adjudication came on regularly for hearing on February 7, 1992, in Department

9 of this Court, before the Honorable Lucy Kelly McCabe. Plaintiff J.A. Savage was represented by Scott L. Fielder, and defendant PG&E was represented by Michael D. Whelan.

After full consideration of the evidence and papers submitted by the parties, as well as the oral argument by counsel, it appears and the Court finds as follows:

(1) The gravamen of the challenged causes of action (First, Second, Third, Fourth, Fifth, Seventh, Ninth) is defamation. The remarks attributed to defendant PG&E were not slanderous, but constituted non-actionable opinion and/or were true ~~in all events, the remarks were privileged. Furthermore, plaintiff is, at minimum, a limited purpose public figure involved in matters of public concern who must prove actual malice by clear and convincing evidence; this she cannot do. PG&E's statements were also protected by the common interest privilege set forth in Civil Code section 47, subd. (c).~~ The strictures of the laws of defamation cannot be avoided by labeling a claim which sounds in defamation as something other than defamation. There is no evidence of activity on the part of PG&E which would give rise to civil liability.

(2) Defendant GP&E's Undisputed Facts Nos. 1-2, 4-21, 23-30, 32-33, 36-38, 41-44, 47, 51-52, 54, 64-65, 69-70, 74-82, 87-88 are undisputed by plaintiff.

(2) Plaintiff purports to dispute PG&E's Undisputed Facts Nos. 3, 22, 31, 34-35, 39-40, 45-46, 48-50, 53, 55-63, 66-68, 71-73, 83-86 but plaintiff has not demonstrated to the satisfaction of the Court that there is a triable issue of material fact as to any of these Undisputed Facts. The facts are irrelevant as a matter of law to the resolution of

the issues before the Court and/or plaintiff's attempts to dispute the facts do not find support in the evidence.

(3) Plaintiff's Facts A, B, C do not find support in the evidence; they are also irrelevant as a matter of law to the resolution of the issues before the Court. Plaintiff's Fact D does not find support in the evidence.

(4) Therefore, it appears and the Court finds that PG&E has shown by admissible evidence and reasonable inferences therefrom not contradicted by other evidence and inferences that the following issues are without substantial controversy and that there is no triable issue as to any material fact with respect thereto:

(a) Defendant PG&E's Issue #1 – The Seventh Cause of Action (Defamation, Slander Per Se) has no merit.

(b) Defendant PG&E's Issue #2 – The Fourth Cause of Action (Tortious Inducement of Breach of Contract) has no merit.

(c) Defendant PG&E's Issue #3 – The Second Cause of Action (Interference with Economic Relationships) has no merit.

(d) Defendant PG&E's Issue #4 – The First Cause of Action (Conspiracy to Induce Breach of Contract) has no merit.

(e) Defendant PG&E's Issue #5 – The Third Cause of Action (Conspiracy to Interfere with Economic Relationships) has no merit.

(f) Defendant PG&E's Issue #6 – The Fifth Cause of Action (Intentional Infliction of Emotional Distress) has no merit.

(g) Defendant PG&E's Issue #7 – The Ninth Cause of Action (Permanent Injunction) has no merit.

IT IS THEREFORE ORDERED that the said motion for summary adjudication is GRANTED as to Issue #1, Issue #2, Issue #3, Issue #4, Issue #5, Issue #6, and Issue #7 and that the final judgment in this action shall award judgment in accordance with the matters so adjudicated.

DATED: MAR - 6 1992

/s/ Lucy Kelly McCabe
LUCY KELLY McCABE
Judge of the
Superior Court

Approved as to Form:

SCOTT L. FIELDER
Attorney for Plaintiff J.A. Savage

First Appellate District, Division One, No. A057595
S037844

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Mar. 17, 1994)

J. A. SAVAGE, Appellant

v.

PACIFIC GAS & ELECTRIC COMPANY,
Respondent

Respondent's petition for review DENIED.

Baxter, J. did not participate.

Lucas
Chief Justice

PUBLIC UTILITIES CODE

---

§ 453. Discrimination in rates, charges, service and facilities; political advertising and literature

(a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(b) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations.

(d) The commission may determine any question of fact arising under this section.

---

(2)

Supreme Court, U.S.
FILED
AUG 15 1994
OFFICE OF THE CLERK

No. 93-1999

In The

Supreme Court of the United States

October Term, 1994

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

J.A. SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Savage was a reporter for Energy User News (EUN) from December 1986 through November 1987. Pacific Gas and Electric Company (PG&E) suspected that Savage was biased against it because she had taken positions PG&E did not like between 1981 and early 1986, regarding its nuclear power facilities. PG&E retaliated against Savage in November 1987, by defaming her to her editors at EUN which resulted in her immediate termination. After her termination Savage wrote as a "stringer" for Journal of Commerce and the Bay Guardian in December 1987. The Public Relations department at PG&E was open to all members of the press. When Savage sought access to PG&E's Public Relations department in December 1987, as a "stringer" for the Journal of Commerce she was barred from access by PG&E based on PG&E's policy of refusing to cooperate with Bay Guardian reporters. The California Court of Appeal held that PG&E's discriminatory conduct against Savage violated California Public Utilities Code section 453, subdivision (a) and the equal protection clause of the California Constitution, Article I, Section 7(a). The questions presented are:

1. Should discretionary review be denied because petitioner has inaccurately set forth the facts in violation of Supreme Court Rule 14.5?

2. Should discretionary review be denied where the petitioner failed to raise the main issue presented here in

QUESTIONS PRESENTED – Continued

the California Court of Appeal and in the California Supreme Court as required by California procedural law?

3. Should discretionary review be denied because the lower court decision was based on independent and adequate state grounds?

4. Is a substantial federal question raised when the California State Courts hold that a California public utilities act of blacklisting a reporter violates the equal protection clause of the California Constitution?

PARTIES

Petitioner, Pacific Gas and Electric Company (PG&E), is a California corporation with its principal place of business in San Francisco, California. Petitioner is an operating public utility which supplies electric service to approximately 4,000,000 electric customers and 3,500,000 gas customers in Northern California.

Respondent, J.A. Savage (Savage), is an individual resident of Oakland, California, and is a residential customer of PG&E electric and gas service.

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No. 93-1999

In The

Supreme Court of the United States

October Term, 1994

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

J.A. SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, J.A. Savage, respectfully requests that this court deny the Petition for Writ of Certiorari submitted by the Petitioner, Pacific Gas and Electric Company.

OPINIONS BELOW

By published opinion, the Court of Appeal, State of California, First Appellate District, Division One (reported at 21 Cal.App.4th 434; 26 Cal.Rptr.2d 305) reversed two trial court orders which granted the petitioner's motion for judgment on the pleadings and petitioner's motion for summary adjudication and reinstated respondent's case for trial. The California Supreme Court

denied Petitioner's Petition for Review without dissent. These two court decisions are reproduced in the appendix to PG&E's Petition for Writ of Certiorari. (Petition.)

JURISDICTION

The Supreme Court of California unanimously denied discretionary review of the published decision of the California Court of Appeal on March 17, 1994. The Court of Appeal decision was decided without dissent on December 27, 1993. Petitioner seeks to invoke this court's discretionary jurisdiction under 28 U.S.C. section 1257. Discretionary jurisdiction should be denied in this case because petitioner failed to raise the issues argued herein in the court below. The court should also decline to invoke discretionary review because the decision of the lower court was correctly decided on Independent and Adequate State Grounds and PG&E's petition raises no new federal question of substance.

STATEMENT OF THE CASE

In January and July 1986, Ms. Savage exercised her rights of freedom of speech and political participation by appearing on these two occasions before the California Public Utility Commission (P.U.C.) on her own time and at her own expense. The hearing she appeared in was a technical hearing regarding the accurate calculation of the cost to ratepayers of the eventual decommissioning of the Diablo Canyon Nuclear Power Plant. Ms. Savage's two 1986 appearances before the P.U.C. were specifically

authorized by Public Utilities Code section 454, California case law and by the California Constitution. PG&E has always conceded that Savage had an absolute right to participate in these hearings, since Savage was a ratepayer in PG&E's service area who would have been directly affected by the outcome of these hearings.

Six months after her participation in the Diablo Canyon case ended she went to work as a reporter for Energy User News (EUN).

In November 1987, Pacific Gas and Electric Company (PG&E) retaliated against Ms. Savage for having effectively exercised her P.U.C. rights in the Diablo Canyon case by having its top executive in its news service department (i.e. the Public Relations Department) defame Ms. Savage to her employer at EUN. Specifically, David Monfried, the Director of Public Relations for PG&E, falsely told her employer that she was secretly a paid employee of a group called the Redwood Alliance that was actively litigating cases against PG&E at the same time she was working for Energy User News reporting on PG&E. PG&E also put these false statements in writing in a follow-up letter to Energy User News. Ms. Savage was promptly discharged for conflict of interest based on these false accusations.

Finding herself out of the full-time position she had at Energy User News, in December 1987, Ms. Savage sought and obtained freelance work as a "stringer" for, inter alia, the Bay Guardian and the Journal of Commerce. When PG&E's Public Relations director learned Ms. Savage was stringing for the Journal of Commerce, Monfried again retaliated. In letters to the Journal of

Commerce, Monfried made it clear that the public relations department, which was open to all other journalists, was off limits to Savage. Monfried told the Journal of Commerce that Savage was persona non grata at PG&E because she had written freelance articles for the Bay Guardian. Once the Journal of Commerce learned that Savage had been barred by PG&E from access to PG&E's Public Relations Department, the Journal of Commerce dropped Ms. Savage as a stringer.

PG&E's retaliation against Savage was not the first time PG&E had interfered with the employment of a journalist whom PG&E suspected had reported unfavorably on one of its nuclear facilities. (See *Widener* v. *PG&E Company* (1977) 75 Cal.App.3d 415.)

A. PG&E's View Of The Facts

The petition for Writ of Certiorari filed by PG&E sets forth in pages 2 through 6 a statement of the case and the lower court decision. Respondent contends that PG&E's statement of the case and its description of the lower court decision are misleading in violation of Rule 14.5 of the Rules of the Supreme Court of the United States.

Respondent agrees that the facts are not in dispute that Mr. Monfried told the Journal of Commerce that Savage was persona non grata and would not be granted access to its public relations department. However, despite petitioner's statement to the contrary the remainder of the facts in this case are in dispute.

To be sure, Savage, the Redwood Alliance and PG&E took different positions before the California P.U.C. as to

the cost of decommissioning PG&E's nuclear facilities and the mechanism for the collection of these costs from ratepayers, one of whom was Savage. But it is an overblown statement to convert the fact that Savage and PG&E took different positions on decommissioning into the accusation that she was an "outspoken opponent of PG&E's nuclear energy production." (Petition, at p.2.)

Nor is it a settled fact in this case that the Bay Guardian was for many years a strident critic of PG&E. (*Ibid.*) These "facts" appear nowhere in the record and, as such, are not before the court.

Throughout its brief, the petitioner also asserts that the lower court decision ordered PG&E executives to cooperate with Savage. This statement is not correct. Missing from PG&E's brief is the nature of who Mr. Monfried was and what department Savage was barred from. Savage was barred from contact with PG&E's public relations department of which Monfried was its director. This department is PG&E's official liaison with members of the media and is open to all members of the media. In a practical sense, the Public Relations department at PG&E is like a floating press conference that members of the media attend when they need to get the utility's position on an issue. It was contact with the public relations department from which Savage was barred. The lower court decision held that under California's constitution and statutes PG&E could not single out Savage and discriminate against her by blacklisting her from PG&E's Public Relations department which is open to all other reporters. Thus, Petitioner has distorted the facts when it claims that the California court decision had forbidden

PG&E executives from declining to cooperate with Savage if she seeks to "publish more articles launching partisan attacks against PG&E." (Petition, at p. 8.)

Finally the linch-pin of the herein petition is PG&E's claim that the lower court opinion held that PG&E was a "state actor" within the meaning of federal case law. (Petition, at p. i, 8, 13.) PG&E has argued that since it was not a "state actor" it was free to engage in discriminatory conduct against any reporter it did not like. PG&E based this argument on the assertion that the lower court decision had concluded that petitioner was a state actor within the meaning of the Fourteenth Amendment. This assumption in the petition is mistaken. On the contrary, the lower court decision held that Fourteenth Amendment "state action" was not required to be present under California's equal protection clause (which contains no such requirement) for PG&E to have violated P.U.C. section 453, subdivision (a). (Petition Appendix 24a-25a.) Thus, contrary to PG&E's central premise, the lower court did not erroneously find that PG&E was a "state actor" within the meaning of the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

This case presents no novel questions of federal law. The lower court decision, holding that PG&E, the world's largest investor owned utility, violated California P.U.C. section 453, subdivision (a) and the California equal protection clause when it "blacklisted" Savage, was based on independent and adequate state grounds. No substantial federal issue worthy of review is present in this case.

This case is nothing more than PG&E's attempt to rewrite the facts so as to frame a federal issue in order to obtain review in this court. Discretionary review is inappropriate because the central issue of "state action" framed by PG&E was not argued in the courts below and did not play a role in the outcome of the case.

I.

THE CENTRAL ISSUE OF WHETHER PG&E WAS A "STATE ACTOR" WAS NOT RAISED IN THE LOWER COURTS AND, THEREFORE, WAS WAIVED

PG&E does not deny in its petition that if it had been a "state actor" that its conduct would have violated Savage's freedom of press rights. Nor could it have successfully done so given the unbroken line of cases that prohibit such conduct by state actors. (See *Times-Picayune Publishing Corporation* v. *Lee* (U.S.D.C., E.D. LA. 1988) 15 Med.L.Rptr. 1713, 1719; *Quad-City Community News Service, Inc.* v. *Jebens* (U.S.D.C., S.D. Iowa, 1971) 334 F.Supp. 8.)

Instead, PG&E argues that the settled case law cited by the California Court of Appeal did not apply to it because PG&E was not a "state actor." Thus, PG&E reasons that since it was not a "state actor" the Fourteenth Amendment and the federal equal protection clause contained therein did not forbid it from discriminating against Savage. Respondent respectfully submits that the court should not entertain this issue because it was not raised in the courts below.

Rule 14.1(h) of the Rules of the United States Supreme Court requires all petitioners to state in their

statement of the case at what stage in the lower court proceedings the issue they seek to have the court review was timely and properly raised. The court will look in vain for this data in the petitioner's statement of the case.

The linch-pin issue in the petitioner's brief is whether the California Court of Appeal decision erroneously concluded that PG&E was a state actor. This issue was not raised by petitioner at all in the California Court of Appeal.

The alleged "state action" issue that petitioner complains about first appeared in the Court of Appeal decision filed on December 27, 1993. (See Petitioner Appendix 21a-30a.) Because this specific part of the decision had not been briefed by the parties, under California Government code section 68081 petitioner had the right to a rehearing on this issue, if it had simply filed a Petition for Rehearing within 15 days. Petitioner failed to request rehearing. Petitioner's failure to petition for rehearing on the issue of "state action" must be viewed as a waiver of this issue at the California Court of Appeal level.

Nor was this issue raised by petitioner in the California Supreme Court. (See PG&E's statement of issues and its table of contents contained in its brief to the California Supreme Court both of which are attached as respondent's appendix 1A and 1B.) It is settled under California case law that the failure to raise an issue or argument in a party's brief constitutes abandonment or waiver of the issue or argument. (*Henderson* v. *Security National Bank* (1977) 72 Cal.App.3d 764, 769, Petition for Review denied by the California Supreme Court on October 20, 1977; *Younger* v. *State of California* (1982) 137 Cal.App.3d 806,

813; *California Civil Appellate Practice*, second Edition, C.E.B., Review by the California Supreme Court, section 22.4, pp. 594-595; Witkin, *California Procedure*, 3rd.Ed., Vol.9, Appeal, section 479, p. 469.) The first time this issue was ever raised was in the current petition. It is also settled that issues not raised, briefed and argued in the California appellate courts are not properly before the United States Supreme Court and should be dismissed for want of jurisdiction. (*Hill* v. *State of California*, 401 U.S. 797, 805, 28 L.Ed.2d 484, 490, 91 S.Ct. 1106 (1971); *In Cardinale* v. *Louisiana*, 394 U.S. 437, 439, 22 L.Ed.2d 398, 401, 89 S.Ct. 1161 (1969); *Beck* v. *Washington*, 369 U.S. 541, 553, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962).) In the *Beck* case the court explained that waiver of the federal issue raised in that case occurred because the litigant failed to list the specific federal issue among its "assignment of errors" in the brief it filed in the state supreme court or to argue it directly in its brief. (*Beck* v. *Washington*, 369 U.S. 541, 553, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962).)

Inasmuch as petitioner failed to raise or argue the "state action" issue in the California Court of Appeal or the California Supreme Court, discretionary review of this matter must be denied based on waiver.

II.

DISCRETIONARY REVIEW SHOULD BE DENIED BECAUSE THE LOWER COURT FINDING THAT PG&E HAD VIOLATED P.U.C. SECTION 453, SUBDIVISION (A) WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

In its petition PG&E claims that the lower court decision was based "solely" upon a United States Constitutional analysis. (Petition, p. 5, fn.2.) The petitioner goes

on to urge that since the lower court's interpretation of federal constitutional law was in error, reversal was required. Respondent submits that review should be denied because the lower court opinion was based on independent and adequate state grounds.

The alleged federal issue petitioner complains about was discussed by the court at Appendix page 21(a) through 30(a). (Petition) The central part of the court's analysis appears in the first four pages of the opinion (Petition, Appendix 21(a) through 24(a).) In the opinion, the lower court made clear that the decision was based on the California case of *Gay Law Students Association* v. *Pacific Telephone and Telegraph Company* (1979) 24 Cal.3d 458, California Constitution Article I, section 7(a), which sets forth the California equal protection clause, and P.U.C. section 453, subdivision (a). The California Court of Appeal also made clear that California's equal protection clause did not require "state action" for a violation of California's equal protection clause to occur. (Petition Appendix 24(a) through 25(a).)

After concluding on the basis of state law that PG&E's conduct could violate California's equal protection clause without the necessity that there be "state action" present, the California Court of Appeal did cite federal cases in which mayors, police chiefs and other government officials had been found to have violated other reporters' freedoms of the press on nearly identical facts. (Petition, Appendix 25(a) through 26(a).) However, the California Court of Appeal did not cite these cases for their Fourteenth Amendment "state action" precedential value. The lower court decision cited these state and federal cases solely because in each of these cases the

courts had found the identical conduct present in the Savage case to be actionable.

While petitioner argues to the contrary, the mere fact the California Court of Appeal cited federal cases for their analogical value in deciding the application of the California Constitution, Article I, section 7(a) to the specific set of facts here, did not convert this case into a federal case ripe for Supreme Court review.

It has long been settled that when a state court decision is based on state law that is both independent and adequate to support the decision, the United States Supreme Court will not review the decision. (*Illinois* v. *Rodriguez*, 497 U.S. 177, 182, 111 L.Ed.2d 148, 157, 110 S.Ct. 2793 (1990).) This is so because "it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." (*Fox Film Corporation* v. *Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935).)

In the context of direct review of a state court judgment (as is the case here), the independent and adequate state ground doctrine is jurisdictional and prevents review whether the state law ground is substantive or procedural. (*Coleman* v. *Thompson*, 501 U.S. ___, 115 L.Ed.2d 640, 655, 111 S.Ct. ___ (1991).)

Of course where the state law decision also discusses federal law, and the adequacy and independence of the state law ground is not clear from the opinion, it will not be assumed that the decision rests on state grounds. (*Michigan* v. *Long*, 463 U.S. 1032, 1041, 77 L.Ed. 2d 1201, 1214, 103 S.Ct. 3469 (1983).)

In the case sub judice, respondent submits that the lower court decision clearly rested on independent and adequate state grounds. The California Court decision expressly held that PG&E's conduct as alleged would violate California P.U.C. section 453, subdivision (a). (Petition Appendix 24(a) and 28(a).) Nearly the entire case analysis was underpinned by the California *Gay Law Students* case which itself was based upon an analysis of California's own equal protection clause which does not contain a Fourteenth Amendment "state action" requirement. (*Gay Law Students Association* v. *Pacific Telephone and Telegraph Company, supra,* 24 Cal.3d 468, 475.) It is true that the lower court decision did cite federal cases for their analogical value. Nevertheless, the crux of the decision was California substantive and constitutional law. As such discretionary review should be denied based on the presence of independent and adequate state grounds which are apparent from the face of the opinion.

III.

DISCRETIONARY REVIEW SHOULD BE DENIED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION

At the heart of PG&E's petition is the assumption that the lower court opinion held that the utility had engaged in Fourteenth Amendment "state action" when it retaliated against Savage.

Section I of the Fourteenth Amendment to the United States Constitution reads in relevant part that:

> "No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *state*

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Of course it has long been settled that in order to violate the Fourteenth Amendment, the defendant must have engaged in "state action." (*Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed. 2d 477 (1974).) Reduced to its essence, PG&E's argument is that since it was not a "state actor" when it retaliated against Savage, it cannot be guilty of having violated the federal equal protection clause of the Fourteenth Amendment. Respondent submits that PG&E's argument is specious because it has based its analysis on the wrong equal protection clause.

The lower court opinion concluded that PG&E's conduct violated the California equal protection clause, not the federal equal protection clause. (Petition, Appendix at p. 24(a).) The California equal protection clause, contained in Article I, section 7, subdivision (a) of the California Constitution, simply states that:

> "A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws."

"Unlike the due process and equal protection clauses of the Fourteenth Amendment, which by their explicit language operate as restrictions on the actions of states, the California constitutional provision contains no such explicit 'state action' requirement." (*Gay Law Students Association* v. *Pacific Telephone and Telegraph Company*, *supra*, 24 Cal.3d 458, 468.)

Furthermore, under Article 1, section 24 of the California Constitution, rights, such as equal protection, guaranteed by California's constitution are expressly not made dependent on those guaranteed by the United States Constitution.

That is not to say that California courts have applied the California equal protection clause without any regard at all to the "state action" concept. (*Gay Law Students Association* v. *Pacific Telephone and Telegraph Company, supra,* 24 Cal.3d 458, 468.) However, in interpreting its own equal protection clause, California courts are not bound by federal "state action" decisions analyzing the Fourteenth Amendment. (*Id.,* at 469.)

In the lower court opinion the California courts simply concluded that the California equal protection clause, that has no express "state action" requirement, was broad enough to prohibit discriminatory acts by state utilities under P.U.C. section 453 subdivision (a). Thus, under the California Constitution a larger group of entities "affected with a public interest" are covered by the ambit of California's equal protection clause than are covered by the Federal equal protection clause. This interpretation of the California Constitution by the California courts simply did not convert this state constitutional case into a federal case. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (*Michigan* v. *Long,* 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201, 1214-1215 (1983.)

Inasmuch as the lower court opinion only concluded that utility discrimination was unlawful under the California equal protection clause and California P.U.C. section 453 subdivision (a), there is no substantial federal question present in this case worthy of review by this court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

BRADLEE S. WELTON and
SCOTT L. FIELDER
Counsel for Respondent

APPENDIX 1a

ISSUES FOR REVIEW

The United States Supreme Court has ruled that California public utilities, like other corporations, hold the constitutionally-protected right not to assist in, and associate themselves with, the dissemination of views with which they disagree.

The Court of Appeal has stripped public utilities of this First Amendment right, and in doing so has ignored clear and controlling Supreme Court constitutional jurisprudence. Moreover, the court below has radically expanded the scope of section 453, subdivision (a), of the Public Utilities Code (a statute which on its face requires utilities to deal even-handedly with their customers in matters concerning rates and services), construing it to *require* utilities to "cooperate" with news reporters who attack the utilities in highly partisan and adversarial stories.

A. Did the Court of Appeal err in denying public utilities the First Amendment right not to assist in the dissemination of views which are antithetical to the utilities' strongly-held beliefs?

B. Did the Court of Appeal err in holding that Public Utilities Code section 453, subdivision (a), *requires* public utilities to "cooperate" with adversarial reporters?

C. PG&E told a reporter's employer that it believed the reporter had a conflict of interest. The employer conducted an investigation and independently decided to terminate the reporter. Can PG&E's statements, as a matter of law, be the cause of the reporter's termination?

APPENDIX 1b

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No. 93-1999

In The

Supreme Court of the United States

October Term, 1994

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

J.A. SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California

PETITIONER'S REPLY MEMORANDUM

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I. RESPONDENT'S WAIVER ARGUMENT IS MERITLESS

Respondent's contention that PG&E has waived its right to challenge the California court's finding of state action is meritless. Where "the state appellate court considered and passed upon the constitutional question" it is irrelevant when or how the issue was raised; the Court may grant certiorari to review the lower court's constitutional ruling. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 298-99, n.3 (1971).

II. THE CALIFORNIA COURT'S DECISION WAS BASED ON FEDERAL CONSTITUTIONAL GROUNDS

The California court said that Savage's "right of recovery depends ultimately on whether PG&E acted unlawfully." (Pet. App., p. 21a.) After discussing a number of lower court decisions finding discriminatory treatment of the press by public officials unconstitutional under the First Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution, the California court said:

> The broad statutory language of PUC section 453 may be reasonably construed as applying to the kind of discriminatory treatment of the press prohibited by the First Amendment and equal protection clause.

(Pet. App., p. 28a.)

It could scarcely be clearer that the California court based its ruling on the First Amendment and the Fourteenth Amendment to the United States Constitution.

Inexplicably, however, respondent asserts that the court was talking about the California Constitution, citing page 24 of the opinion. (Pet. App., p. 24a.) There, however, the court was merely discussing the holding of *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458 (1979), which *was* decided on California constitutional grounds. *Nowhere* did the court so much as mention the California Constitution in connection with *this* case.

Respondent's contention (Br. in Opp., pp. 12-15) that the "lower court opinion concluded that PG&E's conduct violated the California equal protection clause, not the federal equal protection clause" is clearly wrong and flatly at odds with the plain language of the Court of Appeal's decision.

III. THE CALIFORNIA COURT'S DECISION DOES NOT REST ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The core holding of the California court was this:

> "Discriminatory governmental action aimed at the communicative impact of expression is presumptively at odds with the First Amendment." [Citations.] "While public officials need not furnish information, other than public records, to any news agency, a public official may not constitutionally deny to one media access that is enjoyed by other media, because one media is entitled to the same right of access as any other." [Citations.]

(Pet. App., p. 25a.)

PG&E is the "government" and its representatives are "public officials," the court said, because it is "a

public utility enjoying . . . extensive monopolistic authority 'affected with a public interest.'" (*Id.*, p. 27a.) Thus, the court said, to the extent PG&E denied Savage access enjoyed by other reporters, PG&E engaged in conduct "prohibited by the First Amendment and equal protection clause," which in turn may violate PUC section 453. (*Id.*, p. 28a.)

The findings of state action and violations of federal constitutional rights were critical and indispensable to the California court's analysis. The California court does not remotely suggest that PG&E's conduct could trigger liability under PUC section 453 in the absence of the purported violation of Savage's rights under the First Amendment and Fourteenth Amendment to the United States Constitution.

Respondent's contention that the California court's decision rests on adequate state grounds is plainly without merit.

IV. CONCLUSION

PG&E urges the Court to grant the petition for a writ of certiorari, and to accept this case as a companion to *Lebron v. National Railroad Passenger Corp. (Amtrak)*, No. 93-1525, *cert. granted* (May 23, 1994).

Respectfully submitted,

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